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IN THE

Supreme Court of the United States

October Term, 1970

No. 1594

MARIE PHILLIPS, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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STATUTE

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Section 8(a)(5), 29 USC 158 (a)(5) 1964 2

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Marie Phillips, Inc., Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on January 19, 1971.

Citations to Opinions Below

The opinion of the National Labor Relations Board ordering petitioner to recognize and bargain with the union was rendered on September 5, 1969, and it, together with the opinion of the Trial Examiner, is printed in Appendix B and is reported at 178 NLRB 53. The opinion of the Court of Appeals granting enforcement of the Board's order was rendered on November 9, 1970, and is printed in Appendix A and is not yet reported in the official reports.

Jurisdiction of this Court

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on January 19, 1971.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Question Presented

The Court has ruled that under exceptional circumstances unions may ignore the election process as a route to obtaining representation status and go the authorization card route where (1) the employer has committed such sufficiently serious unfair labor practices and so related to a union organization campaign that a fair election (the highly preferable route to go) is impossible, and (2) the union has obtained authorization cards from a majority of the employees, and (3) the authorization cards have been properly solicited so that the cards are sufficiently reliable indications of the employees' desires. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The question presented here is:

Whether union authorization cards tainted by fraud may be validly counted by the union in going the authorization card route to obtaining representation status when such cards were obtained by deliberate misrepresentations of card solicitors who falsely told employees that all or nearly all of the other employees had previously signed and these misrepresentations were relied upon by employees in signing the cards.

Statute Involved

The statutory provision involved is Section 8(a)(5) of the Act, 29 U.S.C. 158 Section (a)(5) as follows:

Sec. 8. (a) It shall be an unfair labor practice for an employer —

5. to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Statement of the Case

The Court of Appeals, by its judgment of January 19, 1971, has enforced an order of the National Labor Relations Board, requiring the petitioner, Marie Phillips, Inc., (hereinafter called the "employer") to recognize and bargain with Local 153, International Ladies' Garment Workers' Union, AFL-CIO (hereinafter called the "union").

The employer has operated a family-owned garment factory in Hartford, Connecticut, for more than thirty-five (35) years. The two principal stockholders of the employer corporation are both over seventy-five years of age. A majority of the employees are women sewing machine operators also well along in years, of foreign extraction, able to communicate better in their native tongue than in English.

During late 1966 and early 1967 the union conducted an organizing campaign among the employer's production and maintenance workers. On January 19, 1967, the employer received a letter and a personal visit from a union representative, requesting recognition as the bargaining agent. Five days later the employer replied with a request to the union to seek recognition through a Board election by secret ballot. The union did not respond to this request.

Shortly thereafter a strike vote was held, which drew the support of only 35 of the 107 employees.

Union's majority status. The union sought to establish its majority status on the basis of union authorization cards signed by 68 employees. The Board determined that the appropriate bargaining unit contained 110 employees, thus requiring 56 valid cards to constitute a majority. Some of the cards were printed in English and some in Italian. In

some instances cards printed in English were signed by employees who could read and write only a foreign language. Other cards were signed by illiterate employees. In one case a card was solicited, in a questionable manner, from a deaf-dumb mute.

Before the Trial Examiner the employer presented evidence to establish that 26 of the cards were signed by employees who had been falsely told by union solicitors that all or nearly all of the other employees had previously signed. Twenty-two of these employees testified that they signed the cards in reliance on the misrepresentations, and many of these testified that they would not have signed but for the misrepresentation. Full development of the factual record was precluded by the examiner's sustaining of objections when seven employees were asked whether they would have signed if they knew the misrepresentations were false. Invalidation of thirteen cards would have destroyed the union's majority.

The testimony of the employees was disputed by the union.

Decision by the Trial Examiner. The Trial Examiner did not resolve the issue of credibility between the employees and the union organizers. Relying on prior decisions of the Board, he ruled that the challenged cards should be counted even if signed in reliance upon false statements that all or nearly all the other employees had previously signed. He stated:

> "Assuming, *arguendo,* there were reliances upon such false statements, 'such puffing does not vitiate the cards. . . .'[9]
>
> "[9]Amalgamated Clothing Workers of America (Sagamore Shirt Co.), 365 F.2d 898, 906-7 (C.A.D. 1966)." (Appendix B, p.)
>
> "I find testimony as to signing cards in reliance on statements that a majority or more of the employees had signed cards is speculative and subjective at best

and clearly irrelevant and immaterial." (Appendix B, p. A-28)

He concluded that unfair labor practices by the employer justified issuance of a bargaining order.

Decision by the Board. The Board conceded that "there may be situations in which a certain card would not have been signed but for the subscriber's reliance upon a misrepresentation that a majority had already signed," (Appendix B, p. A-9) and stated it would no longer adhere to the view expressed in its prior decisions that such reliance is wholly irrelevant. Rather than remand the case to the Examiner for further fact finding in conformity with the revised standard, the Board proceeded to weigh the evidence, even though critical issues of credibility had been unresolved and full development of the record had been barred by the Examiner, in reliance on the Board's previous position. The Board announced it would invalidate a card only where "the objective facts, as evidenced by events contemporaneous with the signing, clearly demonstrate that the misrepresentation was the decisive factor in causing an employee to sign a card." (Appendix B, p. A-9) The employee's own testimony of his reliance was ruled insufficient as a matter of law. Applying its own standard, the Board concluded that only "about half a dozen" of the card signers met the "objective facts" test, a number insufficient to destroy the union's majority status.[1] (Appendix B, p. A-11, N. 6)

The Board issued an order requiring the employer to bargain.

Decision by the Court of Appeals. The Court of Appeals summarily disposed of the misrepresentations by character-

[1] The Board did not clarify what it meant by a test of objective facts. In footnote 6 of its opinion, the Board describes the evidence concerning four employees which apparently meets its test. In each, however, the employee had testified to subjective state of mind – namely, that she had signed because she had been told that all or nearly all the others had signed. The only additional evidence was the employee's testimony that when previously asked to sign, she had refused.

izing the false claim that a majority had previously signed as mere "puffing". (Appendix A, p. A-4) The Court did not reach the question of what standards should be used in determining whether there was sufficient proof of reliance. Apparently the Court of Appeals would dismiss such a false representation as harmless puffing no matter how clear the proof to the contrary, i.e. proof of reliance by the employees on such representations in signing the authorization cards.

The Court enforced the Board's order requiring the employer to bargain.

Reasons for Granting the Writ

This petition raises an important question in the administration of the National Labor Relations Act, a question on which eight Courts of Appeal are divided with five supporting the contentions of the petitioner. Moreover, the decision below is in conflict with the premises of this Court's decision in *NLRB v. Gissel Packing Co., supra,* and is an erroneous extension and misapplication of that decision. The issue raised goes to the very heart of the integrity of the collective bargaining process, because if resolved as was done below, a union may use fraud to secure its majority status and then use that status to bind all in the bargaining unit, including those it has defrauded.

1. There is a direct conflict among the Courts of Appeals as to whether false statements that a majority or more of the employees have signed will invalidate an authorization card signed by an employee who relied on the misrepresentation.

Holding such cards invalid are the First Circuit, *NLRB v. H. Rohstein & Co.*, 266 F.2d 407 (1st Cir. 1959), and the Seventh Circuit, *NLRB v. Dan Howard Mfg. Co.*, 390 F.2d 304 (7th Cir. 1968). The Sixth Circuit has announced it supports this rule, and the Second and Ninth Circuits have supported it by plain implication.

The Sixth Circuit announced in *G. & A. Truck Line Inc.*

v. NLRB, 407 F.2d 120 (6th Cir. 1969), that misstatements as to how many employees have signed are misrepresentations which will invalidate a card when relied upon, and not puffing as maintained by the Board. The Court declined to invalidate the challenged cards only because the employees had conceded that they would have signed regardless of the misrepresentation.

The Second Circuit has strongly implied it takes the same position. In *NLRB v. Philamon Laboratories, Inc.*, 298 F.2d 176 (2d Cir. 1962), a card was challenged because an employee was told that a majority of employees "wanted" a union, which may have been true. The Court observed, "No representation was made that a majority had actually signed up. These circumstances distinguish the present case from *NLRB v. H. Rohstein & Co.*, 266 F.2d 407 (1st Cir. 1959), where a representation that a majority had signed up was shown to be false." 298 F.2d, at 179-80 (Marshall, J.). In *NLRB v. United Mineral & Chemical Corp.*, 391 F.2d 829 (2d Cir. 1968), the Second Circuit rejected a challenge to a card based on a false claim that the signer was told she was the last to sign. The Court relied on evidence establishing that the employee wanted the union and was not relying on the misrepresentation. The plain implication is that reliance would have invalidated the card.

The Ninth Circuit has also supported the rule by implication, rejecting a challenge to a card only because the trial examiner found there was no reliance on the misrepresentation. *NLRB v. Mutual Industries, Inc.*, 382 F.2d 988 (9th Cir. 1967).

The contrary rule, permitting misrepresentations as to a prior signed majority, is supported by the District of Columbia Circuit. *Amalgamated Clothing Workers of America v. NLRB*, 365 F.2d 898 (D.C. Cir. 1966), and the instant case, and appears to be approved by the Third Circuit, *NLRB v. Epstein*, 203 F.2d 482 (3rd Cir. 1953), and the Eighth Circuit, *NLRB v. Tehel Bottling Co.*, 129 F.2d 250

(8th Cir. 1942). The Third Circuit's view in *Epstein* has been dismissed by the First Circuit as one arrived at without discussion of the point, *NLRB v. H. Rohstein & Co., Inc., supra.* The Eighth Circuit's view in *Tehel Bottling Co., supra,* was an alternative holding, since the Court found the evidence of misrepresentation insufficient.

In considering misrepresentation as to facts other than the number who have previously signed, the Second Circuit has flatly declared that "fraud . . . will vitiate consent," and has invalidated cards without a showing that the card would not have been signed but for the misrepresentation, *NLRB v. Dadourian Export Corp.,* 138 F.2d 891 (2d Cir. 1943), and even in the absence of any reliance, when the misrepresentation concerned predicted loss of jobs by non-union employees, *NLRB v. James Thompson & Co.,* 208 F.2d 743 (2d Cir. 1953).

2. The decision below is an erroneous extension and misapplication of this Court's decision in *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969). In *Gissel* this Court carefully considered the circumstances under which presentation of signed union authorization cards from a majority of employees would impose upon the employer a duty to bargain pursuant to Section 8(a)(5) of the Act. In permitting use of authorization cards under certain conditions,[2] *Gissel* circumscribed their use strictly to those cases where cards are obtained from a majority of employees properly solicited and "without misrepresentation or coercion." *Id.* at 579. Indeed, this Court described the Board's practice as precluding a bargaining order "If the union obtained the

[2] *Gissel* permits the Board to issue a bargaining order where (1) an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined a union's majority status and caused an election to be set aside, and (2) the authorization cards unambiguously state that the signer authorizes the union to represent the employee for collective bargaining purposes, and this statement has not been undermined by union misrepresentation that the card will be used only to secure an election.

cards through misrepresentation. . . ." *Id.* at 592. Yet in the present case, cards critical to the union's majority status were obtained by fraudulent misrepresentation.

Moreover, the misrepresentation — that all, nearly all, or a majority of the employees had previously signed — was not only false, and not only relied upon by the defrauded employees, but it is the one form of misrepresentation which inherently carries with it a coercive effect, contrary to the standards of *Gissel.* As to an employee who would not sign a card but for the union's statement to him that they already have a majority, the only plausible explanation for the statement is the not too subtle threat by the union that if the employee does not sign he will be subject to some form of reprisal thereafter. Why else does the union falsely tell the employee that a majority has already been secured? Why else does the union go further and tell the employee that everyone else has signed?

The Court below casually dismissed the entire issue of fraudulent misrepresentation by characterizing the relied upon and false statements of prior majority signings as mere "puffing".

Even the Board was not quite so cavalier, but its position is nonetheless a serious distortion of this Court's decision in *Gissel.* The Board conceded that in some circumstances a misrepresentation by the union that a majority had previously signed would invalidate a card if the misrepresentation was the decisive factor relied upon by the employee when he signed. But the Board then reduced the scope of this rule to near zero by specifying that the only circumstances where the rule would apply are those where the critical issue of reliance can be established by "objective facts." The Board took the position that testimony of the employee as to whether or not he relied on the misrepresentation, even if believed, can never be sufficient to establish the requisite reliance. In the Court below the Board urged that *Gissel* required such a rule.

The Board relied upon this statement in *Gissel:* "We therefore reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry." 395 U.S., at 608. That statement does not lead to the conclusion which the Board reached. In the first place, *Gissel* does not, as the Board does, *prohibit* an inquiry into subjective motivation. It simply declines to *require* such inquiry. Secondly, and more important, the *Gissel* statement referred to inquiry as to what the employee thought the words of the authorization card meant, not his subjective reaction to false statements made to him to induce him to sign, statements that had nothing to do with the wording of the card.

The *Gissel* discussion of misrepresentation concerns the purpose of the card. This Court referred to abuses "primarily arising out of misrepresentations by union organizers as to whether the effect of signing a card was to designate the union to represent the employee for collective bargaining purposes or merely to authorize it to seek an election to determine the issue." 935, U.S. 604. In this context, this Court accepted the *Cumberland Shoe* rule,[3] as to unambiguous, single-purpose cards. But nothing in this Court's discussion of misrepresentations concerning the *purpose* of a card should preclude evidence of a misrepresentation as to critical facts existing at the time the employee made his decision to sign. It is one thing to bar evidence offered to prove an intention contrary to the plain wording of a signed statement. It is totally different to bar evidence offered to prove that a signer was induced to sign in reliance on false statements of fact unrelated to the wording of the card. The evidence presented to the trial examiner by the petitioner here did not seek to contradict the purpose of the card as specified on its face. The employer

[3] *In Cumberland Shoe Corp.*, 144 N.L.R.B. 1268 (1963), the Board said it would validate a card that unambiguously expressed the signers intent to designate the union as collective bargaining agent unless it was proved that the employee was told the card would be used solely for the purpose of obtaining an election.

sought to show that there had been fraud in the inducement, that the employees agreed to designate the union only in reliance upon the false statement that a majority or more of the employees had already signed.

In declining even to consider the testimony of the employees as to whether they had relied on the misrepresentations, the Board perverted this Court's caution in *Gissel* concerning subjective motivation. Even if this Court was prohibiting such inquiry (rather than simply declining to require it), this Court could not possibly have meant to preclude such inquiry in the context of false statements unrelated to the wording of the card. For in barring misrepresentations (other than those concerning the card's purpose), this Court must have been invoking traditional principles concerning the law of fraud. One element is reliance. An employee's testimony of reliance is often the only possible way of establishing this element. It may well be that a trial examiner should view such testimony with caution, and should assess its credibility against the background of whatever post-signing persuasion was undertaken by the employer. But those are considerations affecting weight of testimony, not relevance as a matter of law.

The Board here invoked *Gissel* for the proposition that an employee's testimony of his subjective reliance can never establish this element of fraudulent misrepresentation. The Board required evidence of "objective facts," presumably facts that could become available, if at all, only when the employee expresses his reliance to a third party at the time of signing. Such a rule permits a union to make any false statements whatsoever to obtain signatures, provided only it obtains the signature when no one but the employee is present. In this manner the possibility of "objective facts" to establish reliance will be precluded, and the Board will always find the employee's testimony insufficient as a matter of law. That is the result the Board here achieves in the name of *Gissel*.

Exactly what the Board is requiring by its standard of "objective facts" to prove reliance is not clear. In its opinion, the Board gave examples of four employees as to whom there apparently was proper evidence of reliance. (Appendix B, p. A-11, N. 6). Yet all four testified as to their subjective state of mind — they said they relied upon the misrepresentation that a majority had already signed. The only additional "fact" was their refusal to sign on previous occasions. Thus, their subjective state of mind was critical, yet this same state of mind was considered irrelevant by the Board as to 18 other employees who also testified that they relied on the misrepresentations. To recognize that fraud has been established only where an employee initially refuses to sign a card creates an absurd rule: the union may defraud with impunity the easily persuaded employee who signs the first time he hears the misrepresentation, but may not defraud the more wary employee who requires a second or third visit.

If the Board wants to eliminate inquiry into subjective state of mind, a better rule would be simply to invalidate a card whenever a union solicitor has made a false representation that a majority has previously signed. If reliance by the employee needs to be established, then there is no justification for ignoring the employee's own testimony, as the Board has done here. Nor does it make sense to consider his testimony only when he says he relied on the misrepresentation on the solicitor's third visit, but to ignore his testimony when he says he relied on the first visit.

In urging its approach upon the Court of Appeals, the Board came perilously close to some misrepresentation of its own. The Board's brief in the court below stated that the trial examiner "refused to credit" the testimony of the employees concerning the misrepresentations (Board's brief, p. 22). In fact the trial examiner explicitly refrained from taking any position on the credibility of the employees. He did so, relying on the rule of the D. C. Circuit that such testimony, even if true, does not invalidate a card. Upon

review the Board conceded that the truth of such testimony could invalidate a card, but rejected it because of its view that establishment of such truth required "objective facts." The Court of Appeals dismissed the whole issue of fraud as "puffing".

There thus remains in this case unresolved conflicting testimony which if resolved in favor of the employees would establish all the elements of fraudulent misrepresentation. This Court should either grant *certiorari* and summarily remand for resolution of the factual issues, including the issue of reliance, or give the case plenary consideration to resolve the conflict among the Circuits on the substantive issue of whether relied upon misrepresentations as to prior majority signing invalidate an authorization card.

3. The issue is plainly one of widespread public importance that has not been, but should be resolved by this Court. This Court's decision in *Gissel* will certainly provide an impetus to the use of authorization cards as a means of securing designation as a collective bargaining agent. Having sanctioned the card approach to the extent it has, the Court should be especially concerned that this approach is not subverted by permitting cards to be obtained upon fraudulent misrepresentations of the number of prior signatures, as the Court below has sanctioned. Nor should this Court permit the Board to achieve substantially the same result by the device of rejecting without regard to credibility the testimony of the victims of the fraud as to whether they in fact relied upon the misrepresentations. The power of a union to become the bargaining agent for all the employees and thereby represent non-consenting employees must not be achieved by fraud. Especially is this so as to fraudulent misstatements that a majority has already signed, a claim inherently coercive in its impact upon an employee.

Whether or not to be represented by a union in dealing

with an employer is one of the most important decisions an employee has to make. Once signed and in the hands of the union, an authorization card in effect creates an almost irrevocable agency relationship. The decision to sign a card and create such a relationship should not be allowed to be affected by deception of such kind.

CONCLUSION

For These Reasons Petitioner respectfully prays that the petition for writ of certiorari be granted.

Respectfully submitted,

JOSEPH S. SUDARSKY,
Attorney for Marie Phillips, Inc.,
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JON O. NEWMAN,
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FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,457

LOCAL 153, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 23,562

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MARIE PHILLIPS, INC., RESPONDENT

No. 23,653

MARIE PHILLIPS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petitions for Review and Application for Enforcement of an Order of the National Labor Relations Board

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Decided November 9, 1970

Mr. Max Zimny for petitioner in No. 23,457. *Messrs. Jerry D. Anker* and *Morris P. Glushien* also entered appearances for petitioner in No. 23,457.

Mr. Jerome Weinstein, of the bar of the Supreme Court of Michigan, *pro hac vice,* by special leave of court, for petitioner in No. 23,562 and respondent in Nos. 23,457 and 23,653. *Messrs. Arnold Ordman,* General Counsel, *Dominick L. Manoli,* Associate General Counsel, *Marcel Mallet-Prevost,* Assistant General Counsel, and *John I. Taylor, Jr.* and *J. L. A. de Passalacqua,* Attorneys, National Labor Relations Board, were on the brief for petitioner in No. 23,562 and respondent in Nos. 23,457 and 23, 653.

Messrs. Joseph S. Sudarsky and *Harold L. Luxemburg* for petitioner in No. 23,653 and respondent in No. 23,562.

Before WRIGHT, MCGOWAN and MACKINNON, *Circuit Judges.*

PER CURIAM: These consolidated appeals are before the court on petitions for review filed by Local 153, International Ladies' Garment Workers' Union, and Marie Phillips, Inc. to review an order of the National Labor Relations Board issued against the company on September 5, 1969, and reported at 178 NLRB No. 53. The Board has filed an application for enforcement of that order. The questions presented are (1) whether substantial evidence on the record as a whole supports the Board's findings that the company violated Section 8(a)(1), (3) and (5) of the Act[1]; (2) whether substantial evidence on the record as a

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[1] 29 U.S.C. § 158(a)(1), (3) and (5) (1964).

whole supports the Board's finding that the union represented a majority of the production and maintenance employees on January 19, 1967, and that the company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the union on and after that date; and (3) whether the Board abused its powers in refusing to grant the union's request for further remedial relief. We grant the Board's application for enforcement now of its order as it stands. We reserve to the parties the right to petition this court for reconsideration of the issue of additional remedies after disposition by the Supreme Court of *Int. U. of Elec., Radio & Machine Wkrs* v. *N.L.R.B.* [*Tiidee Products*], —— U.S.App.DC. ——, 426 F.2d 1243 (1970), and disposition by this court of *Int. U., U.A.W.* v. *N.L.R.B.* [*Ex-Cell-O Corp.*], NLRB Case 25—CA—2377, D.C. Cir. No. 24,577.

The evidence depicts a classic organizing campaign by the union and a classic response by the company, including promises and threats by the company against signing cards designating the union as bargaining representative, unfair labor practice discharges, and refusal to reinstate strikers in their jobs. The Board adopted the trial examiner's findings that the company had shown a "complete rejection of the collective bargaining principle" and a "determination to destroy the Union's majority." Under the circumstances, the Board found that the company's conduct violated Section 8(a)(1), (3) and (5) of the Act. The Board also found that a valid majority of the employees in an appropriate bargaining unit had signed up with the union. The Board concluded that the company's "unfair labor practices were so pervasive and coercive as to prevent recourse to an election to determine the question concerning representation raised by the Union's demand for recognition and bargaining. Accordingly, to remedy these unfair labor practices and to effectuate the employees' freely made choice for union representation as manifested by the signed authorization cards of a majority of employees in the unit, our order

shall include provisions requiring [the company] upon request to recognize and bargain with the Union as the exclusive representative of its employees."

We have carefully considered the record as a whole. We hold that the Board's findings clearly pass the substantial evidence test. The company's primary attack is on the Board's designation of the union as bargaining representative of the employees. It challenges the reliability of cards obtained under a promise of nondisclosure except to the Board, the admission in evidence of testimony of the solicitors of the cards, and the exclusion of evidence of employees' subjective motivations in signing the cards. This challenge must fail in the light of *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). There the Supreme Court not only upheld the reliability of cards obtained on the promise of confidentiality, but also rejected a claim that one who witnessed a signature is not competent to testify as to its authenticity. Moreover, also in *Gissel* the Court "reject[ed] any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry." 395 U.S. at 608. *Accord, Int. U., U.A.W.* v. *N.L.R.B.* [*Preston Products*], 129 U.S. App. D.C. 196, 203, 392 F.2d 801, 809 (1967), *cert. denied,* 392 U.S. 906 (1968).

The company also challenges some 26 cards on the additional ground that persons signing them were induced to do so in the belief that a majority of the employees had already signed. The Board found that "a showing, without more, of a misrepresentation as to the number of others who have signed union cards is insufficient to invalidate a clear and unequivocal designation card signed by an employee." This finding is supported by the decisions of this court. "Such puffing [that a majority of the workers had already signed union authorization cards] does not vitiate the cards unless the comments were a means of coercing employees to sign cards out of a fear of majority reprisal."

Amalgamated Clothing Workers of America v. *N.L.R.B.* [*Sagamore Shirt Co.*], 124 U.S.App.D.C. 365, 375, 365 F.2d 898, 908 (1966).

The remedies ordered by the Board require the company to cease and desist from the unfair labor practices found and from in any manner interfering with, restraining or coercing employees in the exercise of their protected rights. The Board's order also requires the company to reinstate the employee victims of the unfair labor practices to their former or substantially equal positions with their rights and privileges intact, to make the reinstated employees whole for any loss of earnings by reason of the company's discrimination against them, to post the appropriate notices, and to bargain with the union as the exclusive representative of the employees. Relying on the finding of the trial examiner, adopted by the Board, that "the nature of the violations strikes at the heart of the Act and calls for a broad order," the union maintains that a more effective prophylactic remedy is needed. The *Tiidee Products* and *Ex-Cell-O Corporation* cases present this very difficult problem of effective remedies for unfair labor practices, particularly in connection with union organizing drives. We have decided to abide the disposition of those cases before resolving the union's claim for additional remedies.

Enforced.

MacKinnon, *Circuit Judge,* concurring in part and dissenting in part: I concur in the court's *Per Curiam* opinion except I would at this time affirm the Board's order denying additional remedies requested by the Union. These requests were for a monetary remedy for losses allegedly incurred as a result of the Company's unfair labor practices and that the Company be required to recall and mail the Board's notice to employees, to grant the Union access to bulletin boards in the plant and to furnish the Union with the names and addresses of employees. With respect to

these issues, I concur with the Board that a monetary remedy is not needed here to effectuate the policies of the Act, *United Steelworkers of America, AFI-CIO* v. *NLRB,* Nos. 23551 & 23709, decided July 10, 1970, slip op. 4, and that the other remedies are not appropriate or necessary to a case such as is here presented in which the Board characterized the conduct of the employer as not demonstrating "a pronounced proclivity for violating the Act." *See J. P. Stevens & Co.* v. *NLRB,* 417 F.2d 533 (5th Cir. 1969), which demonstrates what the Board considers to be an appropriate case for such relief. Clearly, the action of the Board here was within its administrative competence and should be respected by this court. *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203, 216 (1964); *J. P. Stevens & Co.* v. *NLRB, supra,* 417 F.2d at 537.

APPENDIX B

178 NLRB No. 53

D-1380
Hartford, Conn.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

MARIE PHILLIPS, INC.

and

Cases 1-CA-5818
1-CA-6060

LOCAL 153, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO

DECISION AND ORDER

On April 17, 1968, Trial Examiner E. Don Wilson issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, exceptions and supporting briefs were filed by Respondent and the Union; the General Counsel filed a brief and a supplemental brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the briefs, and the entire record in this case, and hereby adopts the findings,[1] conclusions, and recommendations of the Trial Examiner to the extent not inconsistent with the following:

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[1] The Trial Examiner found that Respondent is a Connecticut corporation. We note, however, that Respondent is a New York corporation.

1. The Trial Examiner concluded that Respondent, in violation of Section 8(a)(5) and (1) of the Act, refused to bargain collectively with the majority Union on and after January 19, 1967.

Respondent disputes the Trial Examiner's factual findings principally with respect to the Union's majority status. It argues that although some 42 of the Union's authorization cards (less than a majority) were valid, the Union solicited 26 other cards, at least 14 of which would be necessary to establish a valid majority in the unit hereinafter found appropriate, with the false statement that a majority had already been obtained. Respondent's conclusion is that the Union's resort to "bandwagon psychology" constitutes a "fraudulent deception" and a "subjugation of the statutory rights of the employees" and should not be tolerated.

In rejecting Respondent's contention, the Trial Examiner relied on our decision in the *G & A Truck Line* case, 168 NLRB No. 106. In that case we held, in accord with the opinion expressed in *Amalgamated Clothing Workers of America, AFL-CIO* (*Sagamore Shirt Co.*) v. *N.L.R.B.*, 365 F.2d 898 (C.A., D.C.), that misrepresentations by card solicitors that a majority had already been obtained are generally "immaterial in determining the validity of authorization cards, even when signed in reliance thereon," and do not "overcome the effect of . . . [the employees'] overt action in signing." The Sixth Circuit Court of Appeals disagreed with the seeming premise of our decision that misrepresentation as to the number of employees who have already signed must be viewed as falling in the category of "harmless sales talk or puffing," but nevertheless agreed that the questioned cards in that case were properly counted because the evidence did not substantially support a finding that the card signers relied on the false representation as to majority.[2] We have therefore re-

[2] *G & A Truck Line* v. *N.L.R.B.*, 407 F.2d 120.

examined our position as to the principles to be applied in situations of this kind. We continue to believe that a showing, without more, of a misrepresentation as to the number of others who have signed is insufficient to invalidate a clear and unequivocal designation card signed by an employee. This is so because such a card must be presumed to express the individual intent of the signer regardless of the wishes of others. There is no necessary inconsistency between the fact that the signer had been incorrectly told that others had already signed and his own genuine desire for union representation. We nevertheless recognize, as we did in the *I. T. T.* case, 165 NLRB No. 98, that there may be situations in which a certain card would not have been signed but for the subscriber's reliance upon a misrepresentation that a majority had already signed, and to the extent that our *G & A* decision suggests that reliance is a wholly irrelevant consideration we no longer adhere to that view. Where the objective facts, as evidenced by events contemporaneous with the signing, clearly demonstrate that the misrepresentation was the decisive factor in causing an employee to sign a card, we shall not count such card in determining a union's majority. However, for reasons we elaborate on below, we adhere to the view, supported in this respect by court precedent, that where the only indication of reliance is a signer's subsequent testimony as to his subjective state of mind when signing the card, such showing is insufficient to invalidate the card. Such subjective testimony is hardly probative, since it is not subject to the customary safeguards of confrontation by other witnesses and probing cross-examination. It amounts to an unverifiable subjective assertion about a subjective state of mind at a time long past. Such an assertion, being untestable, is highly susceptible to distortions due to hindsight, changing judgments concerning the signer's interest, pressures brought by the employer or others, and the like, so that present attitudes inevitably color the signer's assertion about his earlier state of mind at the

time he signed the card.[3] Particularly is this so in situations where, as here, it appears that employees have been intimidated by their employer's unfair labor practices.[4] Subjective assertion of reliance on the misrepresentations involved herein cannot overcome the objective fact of signing the card; for cards to be invalidated on the basis of such misrepresentations, it is necessary that the asserted reliance on the misrepresentations be established by objective evidence corroborating or supporting the subjective assertion.[5]

Respondent has not attempted to differentiate between subjective and objective testimony of reliance by the 26

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[3] As the Court of Appeals for the First Circuit remarked in *N.L.R.B.* v. *Southbridge Sheet Metal Works*, 380 F.2d 851, 856 (C.A. 1), when rejecting a contention that analogous misrepresentations invalidated a union's card majority:

> . . . the vacillating testimony of employees in the hearing, held almost a year after the organizing campaign concluded and . . . under the scrutiny of company counsel and officials, illustrates the wisdom of requiring fairly strong evidence of misrepresentation and evidence of communication or recantation before cards secured at a much earlier date are adjudged invalid. . . . Without going so far as to say that a misrepresentation cannot ever vitiate a card when it is not proffered as a sole reason for signing, we have no hesitation in saying that here the representation that there would be an election does not invalidate Therrien's card.

Also see *Joy Silk Mills* v. *N.L.R.B.*, 185 F.2d 732 (C.A. D.C.), enfd. 85 NLRB 1263, cert. denied 341 U.S. 814: ". . . an employee's thoughts (or afterthoughts) as to why he signed a union card, and what he thought that card meant, cannot negate the overt action of having signed a card. . . ."

The Board took a similar position in a related context in *Levi Strauss & Co.*, 172 NLRB No. 57 (pages 8 and 9), when it held that it would not probe into the purely subjective intent of card signers to invalidate their otherwise clear designation cards.

[4] The Supreme Court has recently stated," [W]e also accept the observation that employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activities in violation of Section 8(a)(1) [citation omitted]. We therefore reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry." *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575.

[5] Such objective evidence would, of course, include oral statements immediately preceding or concurrent with the signing of the card.

disputed card signers. Most of them did not try to nullify their authorization cards, and some, who did, did not do so until the reopened hearing, when they gave *subjective* testimony only, not susceptible of either contradiction or effective cross-examination, that they relied on representations that a majority had already signed.[6] As an example, Respondent's brief asserts that Lucia Sammartino, one of the disputed card signers, testified that she would not have signed but for solicitor Appel's statement that almost all the employees had signed. The record shows, however, that when Respondent called Sammartino as a witness at the original hearing in June, she gave no such testimony, but testified only that she signed because she was nervous, and that the Union solicitor showed her a bunch of cards (which she estimated at as low as 50, or less than a majority) and said they had all been signed, but did *not* tell her how many others had also signed. It was not until Respondent recalled Sammartino at the reopened hearing in November

[6] Of the 26 disputed signers only about half a dozen – a number clearly insufficient to destroy the Union's majority in the 110-employee appropriate unit (as we find below) – testified as to certain objective facts which might tend to show that their cards would not have been signed in the first instance but for the misrepresentation that a majority had already signed. For example, Salvatrica Cancellieri testified that she had refused to sign on several previous occasions, but finally signed because card solicitor Fiamma told her that all but a few had signed. Josephine Contrino testified that she had refused to sign on two prior visits, but signed on the third visit because told by Fiamma that everybody else had signed. Angeline Speziale testified that she refused a request to sign a card unless the others did, and later when Fiamma told her that the others had signed she felt reassured and was finally willing to sign. And Mary Petriccione on various occasions refused Fiamma's request that she sign a card, and finally signed after he told her that everybody had signed; but she was unable to sleep, and then wrote the Union a letter revoking her authorization card. Fiamma, however, denied telling any prospects that a majority of the employees had already signed. Although the Trial Examiner found that the employees' testimony was controverted and declined to credit it, we note, in addition, that such testimony, even if credited and regarded as proving reliance, relates to an insufficient number of cards to impair the Union's card majority.

We also note that such testimony was uncorroborated and was adduced after Respondent had engaged in unlawful conduct which had the inherent tendency of causing employees to believe, after having signed the cards, that their interests would be best served by renouncing the Union and reestablishing themselves in Respondent's good graces.

that Respondent finally elicited testimony that she would not have signed but for the solicitor's representation that almost all the employees had signed.

In all the circumstances, we are satisfied that the aforementioned subjective testimony is not reliable[7] and provides no probative evidence that employees giving such testimony did not want the Union when they signed their cards, or that they were *tricked* into signing because they thought the Union already was the exclusive representative even without their cards.

The facts, in our view, distinguish the instant case from *N.L.R.B* v. *Rothstein & Co.,* 266 F.2d 407 (C.A. 1), where the Court set aside the Board's finding of a union's bare card majority on the ground that, according to the Court, a signer indicated *at the time he signed the card* that he was doing so in reliance on the representation that a majority had already been secured. Rather, the facts are like those in *N.L.R.B.* v. *Cactus Petroleum Inc.,* 355 F.2d 755 (C.A. 5), where the Court stated, with respect to the testimony of five employees that they would not have signed cards except that the union told them that a majority of the employees had already signed:

> We agree with the Board's rejection of this testimony on the basis that the testimony of the signers as to their subjective state of mind at the time of signing did not here operate to overcome the effect of their overt action in signing.

In the absence of strong and convincing evidence of objective facts showing that the card majority in this case would not have been obtained but for the misrepresentations that

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[7] The unreliability of subjective testimony of this character is further evidenced by the vacillating testimony of some of the witnesses in this case. Thus several employees testified at the original hearing that they did not care whether the solicitor's statement as to majority status was true, and others testified that they did not believe such representation of the solicitors. Yet, upon the reopening of the hearing, a number of the aforementioned employees testified they would not have signed had they known that the solicitor's statement was false.

a majority had already signed up, we accordingly agree with the Trial Examiner that a valid majority existed.

2. The Trial Examiner found that three named employees, otherwise within the appropriate unit at the time of the refusal to bargain, should nevertheless be excluded solely because they stopped working during each year so as not to decrease their full social security pension benefits. Respondent contends that these employees should be included. For the reasons set forth in the *Holiday Inns* case, 176 NLRB No. 124, a majority of the Board[8] finds that Respondent's contention has merit. In the present case the above-mentioned social security pensioners have been relatively long-time employees of Respondent, and in fact worked full-time until becoming social security pensioners. There is no indication that they do not intend to continue working for Respondent in the future, they apparently share some employee benefits, and they do not appear to be foreclosed from other benefits as long as their hours worked entitle them to such. We include them in the unit.

In all other respects we agree with the Trial Examiner's finding as to the employees in the appropriate unit, and further find that the revised total number of employees in the unit was 110.

3. In all other respects we adopt the findings and conclusions of the Trial Examiner.

In adopting the finding and conclusion that Respondent violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union on and after January 20, 1967, we note that Respondent, by its top officials (President Rametta and Vice President Pricone), engaged in a widespread, continuous, and flagrant campaign of antiunion conduct, beginning in early November 1966 and not termi-

[8] Chairman McCulloch and Members Fanning and Zagoria. Members Brown and Jenkins dissent, and would affirm the Trial Examiner's finding that these employees do not have a sufficient community of interest with the regular employees to be included in the unit.

nating until many months after rejecting the Union's bargaining demand of January 19, 1967. Thus, individual employees were called into the office, told that Respondent knew some employees were trying to get the Union in, asked about signing union cards, advised not to sign, promised and given raises to coerce them not to sign, threatened with loss of wages and plant closing if the Union got in, and asked to find out who had started the Union and to persuade fellow employees not to sign union cards. In addition, Respondent discriminatorily discharged an employee during the original hearing; and after the close of that hearing but before the reopened hearing Respondent discriminatorily refused the unconditional requests for reinstatement of seven other employees.

These unfair labor practices were so pervasive and coercive as to prevent recourse to an election to determine the question concerning representation raised by the Union's demand for recognition and bargaining. Accordingly, to remedy these unfair labor practices and to effectuate the employees' freely made choice for union representation as manifested by the signed authorization cards of a majority of employees in the unit, our order shall include provisions requiring Respondent upon request to recognize and bargain with the Union as the exclusive representative of its employees. *N.L.R.B.* v. *Gissell Packing Company, supra.*

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Marie Phillips, Inc., Hartford, Connecticut, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating, threatening, or promising or granting benefits to, its employees with respect to their union or other concerted activities.

(b) Discouraging membership in Local 153, International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization of its employees, by discharging employees, refusing to reinstate unfair labor practice strikers upon their unconditional application to return to work, or by discriminating against its employees in any other manner in regard to their hire or tenure of employment or any term or condition of employment.

(c) Refusing to bargain collectively with Local 153, International Ladies' Garment Workers' Union, AFL-CIO, as the exclusive representative of all employees at its Hartford plant, excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act, concerning rates of pay, wages, hours of employment, and other terms and conditions of employment.

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named Union or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of mutual aid or protection as guaranteed in Section 7 of the Act, and to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer Concetta Cambria, Joseph Aiello, Francois Bessette, Virgilio Coelho, Benny Fiamma, Frank Papa, Thomas Spada, and Louis Greca immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights

and privileges, and make them whole in the manner set forth in "The Remedy" portion of the Trial Examiner's Decision for any loss of earnings by reason of Respondent's discrimination against them.

(b) Notify any or all of the above employees, if presently serving in the Armed Forces of the United States, of their right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Upon request, bargain collectively with the above-named Union as the exclusive representative of all the employees in the unit described above, concerning rates of pay, wages, hours of employment, and other conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payments records, time-cards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due and the rights of employment under the terms of this Order.

(e) Post at its Hartford, Connecticut, plant copies, in English, Italian, and Spanish, of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 1, shall, after being signed by Respondent's authorized representatives, be posted by it immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure

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[9] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals Enforcing an Order."

that such notices are not altered, defaced, or covered by any other material.

(f) Notify said Regional Director, in writing, within 10 days from the date of this Decision and Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C., September 5, 1969.

Frank W. McCulloch, *Chairman*

John H. Fanning, *Member*

Gerald A. Brown, *Member*

Howard Jenkins, Jr., *Member*

Sam Zagoria, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT (AS AMENDED)

we hereby notify our employees that:

YOU are free to join or not to join any union of your choice. We do not have the right to interfere with your choice.

WE WILL NOT question, threaten, or give benefits to our employees in connection with their membership in or sympathies for or other activities in behalf of Local 153, International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization.

WE WILL NOT discharge or in any way discriminate against any of our employees because of their activities in behalf of the above-named Union or any other union or because of other protected concerted activities.

WE WILL NOT refuse to bargain collectively with the above-named Union as the exclusive bargaining representative of our employees in the following appropriate unit:

> All employees employed at our Hartford, Connecticut, plant, excluding office clerical employees, guards, professional employees and supervisors as defined in the National Labor Relations Act.

WE WILL NOT in any other manner interfere with our employees in exercising their rights to join or assist, or to refrain from joining or assisting any union, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condi-

tion of employment as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL NOT tell our employees that they will not make as much money if the plant goes Union or that we will close the shop before we let the Union in or that the plant won't be the same if the Union comes in or that the employees will work less hours and be shifted from job to job if the Union comes into our plant.

WE WILL NOT tell our employees that if a union comes in they will only work a 35-hour week or that they will end up losing money.

WE WILL NOT ask any of our employees to talk to other employees and persuade them against the Union.

WE WILL NOT tell any of our employees that if the Union gets in, the women employees will be out of a job and that we will subcontract the work.

WE WILL NOT tell any employee that if the Union comes into our plant, we will get more employees and cut down on overtime.

WE WILL NOT ask any employee if he has signed a card for the Union or engaged in any other union activity.

WE WILL NOT tell employees that if the Union comes in they will lose time if there is no work in their departments.

WE WILL NOT tell our employees that we will find out if they engaged in union activity.

WE WILL NOT tell any employee that we will take care of him if he does not engage in union activities.

WE WILL NOT tell any employee that he will be sorry if he goes Union.

WE WILL NOT ask an employee to find out from another employee why he had signed a union card.

WE WILL NOT tell an employee that he has something to lose if he signs to get the Union into the plant.

WE WILL offer to reinstate and pay backpay to unfair labor practice strikers Joseph Aiello, Francois Bessette, Virgilio Coelho, Benny Fiamma, Frank Papa, Thomas Spada, and Louis Greca for the wages they lost because we did not reinstate them when they unconditionally asked for their jobs back.

WE WILL notify any of the above employees, if presently serving in the Armed Forces of the United States, of their right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

WE WILL offer to reinstate and pay backpay to Concetta Cambria for the wages she lost because we discharged her.

WE WILL bargain collectively, upon request, with the above-named Union, as the bargaining representative of our employees in the above described unit, and embody in a signed agreement any understanding we reach.

MARIE PHILLIPS, INC.

(Employer)

Dated ..... By.....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions they may communicate directly with the Board's Regional Office, 20th Floor, John F. Kennedy Federal Building, Cambridge and New Sudbury Streets, Boston, Mass., Telephone 617-223-3300.

APPENDIX B - B

TXD-(SF)-42-68
Hartford, Conn.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

MARIE PHILLIPS, INC.

and Case Nos. 1-CA-5818
1-CA-6060

LOCAL 153, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO

ROBERT C. ROSEMERE and MICHAEL BROWN, *Esqs.*, of Boston, Mass., for the General Counsel.

JOSEPH SUDARSKY and JAY S. SIEGEL, *Esqs.*, of Hartford, Conn., for Respondent.

JEROLD D. JACOBSON, *Esq.*, of New York, N.Y., for the Charging Party.

TRIAL EXAMINER'S DECISION

Statement of the Case

E. DON WILSON, Trial Examiner: The charge in 1-CA-5818 was filed on February 10, 1967, by Local 153, International Ladies' Garment Workers' Union, AFL-CIO, herein the Union. Upon this charge, the General Counsel of the National Labor Relations Board, herein the Board, issued a complaint and notice of hearing dated March 30, 1967, alleging that Marie Phillips, Inc., herein Respondent,

had violated Section 8(a)(5) and (1) of the National Labor Relations Act, herein the Act. At the hearing herein, the complaint was amended on May 11, 1967, to allege a violation of Section 8(a)(3) and (1) of the Act by the discharge of an employee.

Pursuant to due notice, a hearing in this matter was held before me at Hartford, Connecticut, on various dates between May 9, 1967 and June 27, 1967, on which latter date the hearing was closed. Subsequent to the close of the hearing, the Board decided *I.T.T. Semi-Conductors, Inc.,* 165 NLRB No. 98, which occasioned me to reopen the record for the purpose of receiving evidence on the question of whether certain card signers had relied upon alleged misrepresentations by union solicitors. Also, on October 23, 1967, General Counsel, on the basis of a charge filed by the Union in Case 1-CA-6060 on August 25, 1967, moved to reopen the hearing, consolidate cases and amend his complaint so as to allege further violations of Section 8(a)(1)(3) and (5). On November 2, this motion was granted over Respondent's opposition.

Pursuant to due notice the reopened hearing was held before me on November 8 and 9, 1967, at Wethersfield, Connecticut. At the original and reopened hearing, the parties fully participated. Briefs and supplemental briefs and memorandum letters have been received from General Counsel and Respondent and memorandum letters have been received from the Union. All have been considered.

Upon the entire record[1] in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. Respondent's Business

At all times material Respondent has been a Connecticut corporation with its principal office and place of business

[1] The motion to correct the Transcript is granted.

located in Hartford, Connecticut, where it has been engaged in the manufacture, sale, and distribution of women's dresses and related products. Annually Respondent ships dresses valued in excess of $50,000 from its Hartford plant directly to points outside the State of Connecticut. At all material times Respondent has been engaged in commerce within the meaning of the Act.

II. The Labor Organization

At all material times the Union has been a labor organization within the meaning of the Act.

III. The Unfair Labor Practices

A. The Issues

1) Did several representatives of Respondent interfere with, restrain, and coerce employees by a variety of conduct including interrogation, threats of plant closing and loss of overtime, offers and grants of increased benefits if the Union were rejected, threats of loss of employment and benefits; 2) Did Respondent discharge an employee because of her union activities; 3) Did Respondent unlawfully refuse to bargain with the Union; and 4) Was there an unfair labor practice strike and are various strikers entitled to reinstatement and backpay?

B. Background

Respondent's is a family business, the principal stockholders being Frank Rametta, president, and his close relative, Minnie Pricone, vice president. They have been engaged in the dress manufacturing business for over 35 years. Each is 73 years of age. As Respondent points out in its brief, many of the employees are of "foreign extraction" and quite friendly with management.

In September 1966,[2] the Union began an organizing campaign among Respondent's employees.

[2] Hereinafter the last 6 months of the year refer to 1966 and the first 6 months of the year refer to 1967, unless otherwise stated.

C. The Request to Bargain

On January 19, orally and by letter the Union demanded of Rametta that Respondent recognize the Union as bargaining representative of Respondent's employees. The Union offered to prove its majority "through an impartial card count." On January 24, Rametta told the union representative, Cooper, that he didn't believe the Union represented his employees and declined to recognize the Union. On January 25, the Union again demanded recognition. Recognition was again refused. It is clear from the record that the Union was demanding bargaining and Respondent refused to bargain.

D. Appropriate Unit

While there are questions as to the inclusion or exclusion of particular employees within the unit, I find based upon the entire record, that an appropriate unit is:

> All employees of Respondent employed at its Hartford plant, excluding office clerical employees, guards, professional employees and supervisors.

The above unit amounts to a production and maintenance unit. The Board has found that in this industry such a unit is an appropriate one.[3]

In evidence is a payroll list of all employees for the pay period ending January 21, and no employees were added to or taken off this list between January 19 and February 7. There are 115 names on the list. It was stipulated that two employees, Delgado and Garfi, were incorrectly on the list, reducing the number of employees to 113. General Counsel would eliminate and Respondent would retain 7 other employees whose names are on the list, Mozzicato, Vasques, Vinci, Scolowski, Jackson, Smith and Thelma Walton. Respondent would eliminate from and General Counsel would retain on the list the cutters, Aiello, Bessette, Coelho,

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[3] *Dove Manufacturing Co.*, 128 NLRB 778.

DeMauro, Fiamma, Greca, Famiglietti, Papa and Spada. Respondent would also eliminate from the list and General Counsel would retain on the list two IBM operators, Green and Harris.

1. Social Security Recipients

Mozzicato, Vinci, and Vasques have each been employed by Respondent for over 20 years as operators. Each draws a social security pension. They limit their earnings so as not to decrease their full social security benefits. When they have earned $1,500 in a year, Respondent so informs them and they stop working for the balance of the year. In light of their special employment status, they do not have sufficient community of interest with regular production and maintenance employees to warrant their inclusion in the unit.[4] I exclude them.

2. Theresa Scolowski

Scolowski last worked the week ending December 31. Respondent has been unable to locate her although it has tried. Since December she simply has not shown up for work. Respondent does not know why. I find that as of January 19 and thereafter, she was not an employee and she is not included in the unit.

3. Beulah Smith

Smith last worked the week ending August 20 until she returned to work about May 20 during the course of the hearing. She had left because of pregnancy and she had an understanding with Respondent that she would return to work when she was ready. Her insurance was cancelled by Respondent while she was off work but such cancellation is automatic in pregnancy cases until they return to work. The record does not reveal when Smith had her child but

[4] *Taunton Supply Corp.*, 137 NLRB 221, 223; *Horn & Hardart Company*, 147 NLRB 654, 659.

it was probably about a month before November 21 when her insurance was cancelled. I find she was on pregnancy leave between January 19 and February 7 and should be included in the unit.

4. Thelma Walton

Thelma Walton left Respondent's employ a "couple of years" before the hearing. She said she didn't feel well. She received no earnings in 1966. Respondent carried her on the payroll for about a year. She returned to the employ of Respondent about May 15. I do not consider that she was on leave of absence or sick leave from January 19 to February 7. I find her employment had ceased. She is not included in the unit. There was no continuing employer-employee relationship.

5. Betty Jackson

Jackson left because of pregnancy on April 9, 1966. As of the dates of the hearing, she had not returned to work. Respondent claims it holds a job open for a couple of years in case of pregnancy but I find this is too loose an arrangement to constitute a continuing employer-employee relationship. Jackson's insurance was cancelled in December. I find she was not an employee as of January 19 to February 7 and she should not be included in the unit.

6. The Cutters

There were nine cutters as previously indicated. During the period in question the cutters were temporarily in a building separate from but adjacent to the building housing the rest of the employees. By October 1967, all employees including cutters were to be in the one building. The cutters have their own supervisor who does not supervise other employees. The cutters do not customarily do any work but cutting. Since the cutters constitute a craft they might constitute a separate unit. But here, no labor

organization seeks to represent them apart from the production and maintenance employees. While temporarily housed in a separate building they are part and parcel of a single operation. The Union seeks to represent the cutters as part of the production and maintenance unit and the cutters and other employees "may also constitute a single bargaining unit."[5]

The cutters are included in the unit.

7. The IBM Operators

There are two IBM operators. They work in the shipping department in an area partially partitioned by their IBM machines and filing cabinets. The man who fills an order in the shipping department places an IBM number on the rack with the garments and pushes the rack over to the IBM operators who are located right next to where they pick the dresses. The IBM operator goes to the rack and pulls the IBM folder which is on the first garment of the order. She checks the IBM folder and then counts the number of dresses in the order to insure that the number in the folder is accurate. She then prepares invoices with the use of a typewritter and IBM machine. She hangs the invoice back on the order. A shipping department employee picks up the order and double checks to see that the girls used the right cards and that the order and invoice are correct. This employee then wheels the order over to packing which is part of the shipping department. The IBM folders remain in the shipping department. When the girls count the number of dresses on the rack and in an order they do so by hand. In preparing the invoices most of the work is done by the IBM machine and the balance by typing. Respondent's payroll records list the IBM operators as being in the shipping department.

The IBM operators needed to meet certain minimal educational requirements and in the event one was away from

[5] *K.W.B. Manufacturing Company*, 106 NLRB 1305, 1306.

work other employees were not qualified to substitute for her. These girls took no dictation and their clerical work was limited to the typing on the invoices and operation of the IBM machines. There are no other alleged clerical employees.

I find these girls had more of a community of interest with the shipping department employees than did the IBM typists who worked in partitioned offices in *Newark Eelectronics Co., Inc.,* 131 NLRB 553, cited by Respondent. I find, contrary to Respondent's contention that the IBM operators are office clericals, that they are plant clericals and therefore included in the unit.

8. Total Number of Employees in Unit

As of January 19 to February 7, having eliminated 8 employees from the list of 115 employees, I find there were 107 employees in the appropriate unit.

E. Majority

General Counsel contends that though the Union made its last bargaining demand on January 25, such demand was continuing at least until February 7, when the Union struck because of Respondent's refusal to bargain and other unfair labor practices. In the circumstances of this case, I find that the Union by its oft repeated demands for recognition was repeating such demand when it struck on February 7. Respondent refused to comply with such request. There had already been refusals to bargain following clear requests to bargain. The strike was an attempt to enforce the requests. As of the time of the strike on February 7, a further expressed request to bargain "would have been a vain and useless formality."[6]

General Counsel has introduced into evidence 69 authorization cards signed or marked by employees or in one instance, by agent, within the unit. By these signed cards,

[6] *Scobell Chemical Co.* v. *N.L.R.B.*, 267 F.2d 922, 925.

each signer authorized the Union "to represent me in all matters of collective bargaining with my employer" (Respondent). Some of these 69 cards were printed in Italian and contained substantially the same authorization. The authorizations are unambiguous. Fifty-four employees constituted a majority.

1. Strictly Confidential or Secret

Each English written card is marked in plain words, "Strictly Confidential." The Italian written cards have a substantially equivalent marking in Italian.

Respondent contends that no cards obtained by union solicitors should be considered because, since the cards were marked "secret", the solicitors were not competent witnesses. Respondent insists that only the signers were competent witnesses. Respondent claims that no signer released a solicitor from the "secrecy" agency.

Here, assuming an agency relationship, "An agent is privileged to reveal information confidentially acquired by him in the course of his agency in the protection of a superior interest."[7]

Here the effectuation of the purposes of the Act requires the disclosure of the names of the signators. The interests of the United States require this disclosure. These cards, including their signatures, were relevant to material matters before an agency of the United States. There is a paramount public policy of allowing unrestricted inquiry. There is here no such relationship as attorney-client or doctor-patient. Here the cards are unambiguous and clear. There was no fraud as to the purposes of a card.

In *N.L.R.B.* v. *Consolidated Rendering Company,* U.S.C.A. 2d, decided December 11, 1967, the Court held, "Three cards were challenged on the ground that the signers

[7] Restatement of Agency 2d, Section 395, Comment f.

had been told that the cards would not be shown to anyone. The Board argues that this does not detract from the reliability of the cards so as to justify their invalidation. We agree. Compare *N.L.R.B.* v. *Southbridge Sheet Metal Works, Inc.*, 380 F.2d 851, 856 (1st Cir. 1967)."

The "secret" notations on these cards did not make the witnesses incompetent as to their testimony identifying the signatures.

2. Alleged Misrepresentations as to Majority Signing

Twenty-six employees[8] testified that they signed cards in reliance on alleged misrepresentations that a majority or most or 95 percent, or such, had already signed cards for the Union. Respondent urges that the cards are therefore invalid. Much of this testimony was denied by union solicitors. Some of the representations were allegedly made by fellow employees and General Counsel contends that the Union would not be responsible for such alleged misrepresentations because the fellow employees were not agents of the Union. I do not resolve the credibility issues nor pass upon any agency theory. There is no suggestion that any employees were coerced by the alleged misrepresentations into signing cards. No threats were addressed to any card signer. Assuming, *arguendo,* there were reliances upon such false statements, "Such puffing does not vitiate the cards. . . ."[9]

The Board in *I.T.T. Semi-Conductors, Inc.*, 165 NLRB No. 98, indicated that a card would be rendered invalid

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[8] Concetta Rizza, Concetta Manciaglia, Josephine Tanasi, Elizabeth Hayes, Angeline Speziale, Mary Tosi, Ruth Hill, Marcellina Vasquenz, Ida Thomas, Ethel Hall, Atilia DeRenzo, Lucia Sammartino, Theresa Gentile, Hollyfield Hardwick, Ortilla Cerejo, Guissepia Italia, Anna Interlandi, Mary Pettricione, Giuseppina Tiralongo, Giuseppima Formica, Willie DeLawrence, Ethel Campbell, Mander Henderson, Louise Rossano, Angelo Casais, Salvaticia Cancellieri.

[9] *Amalgamated Clothing Workers of America (Sagamore Shirt Co.)*, 365 F.2d 898, 906-7 (C.A.D.C. 1966).

upon proof that it would not have been subscribed but for the erroneous representation that a majority had signed cards. This decision occasioned me to reopen the record in this case to receive further evidence. Since the *I.T.T.* decision the Board has decided *G & A Truck Line, Inc.*, 168 NLRB No. 106, holding clearly that misrepresentations as to majority, "are immaterial in determining the validity of authorization cards, even when signed in reliance thereon." The Board continued, holding, "Such statements are harmless salestalk or puffing, which do not operate 'to overcome the effect of . . . [the employees] overt action in signing.'" The Board in this case cited appropriate precedents.[10]

The wording on the cards was unambiguous. An employee's subjective state of mind as revealed months later should not negate the clear statement of the card as to bargaining representative choice. The subjective intent does not vitiate the act of signing a card.[11]

> "We agree with the Board's rejection of this testimony on the basis that the testimony of the signers as to their subjective state of mind at the time of signing did not here operate to overcome the effect of their overt action in signing."[12]

I find testimony as to signing cards in reliance on statements that a majority or more of employees had signed cards is speculative and subjective at best and clearly irrelevant and immaterial. Such cards are to be counted as evidence of majority status should such be the only evidence offered to vitiate them.

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[10] Cf. *N.L.R.B.* v. *Rothstein*, 266 F.2d 407; *N.L.R.B.* v. *Dan Howard Mfg. Co.*, decided January 12, 1968, U.S.C.A. Seventh Circuit; *N.L.R.B.* v. *United Mineral & Chemical Corporation*, decided January 16, 1968, U.S.C.A. Second Circuit.

[11] *Gary Steel Products Corp.*, 144 NLRB 1160.

[12] *N.L.R.B.* v. *Cactus Petroleum, Inc.*, 355 F.2d 755. (C.A. 5).

3. Alleged Misrepresentations That Louis DeMauro Had Signed a Card for the Union

DeMauro never signed a card. Two card signers,[13] testified that they signed after they were told DeMauro had signed a card. As Respondent contends in its brief, DeMauro is one of the oldest employees of Respondent and is highly regarded by employees. Assuming, *arguendo,* that misrepresentations as to DeMauro were made, they would be immaterial as mere salestalk or puffing easily checked out by any employee. Any employee could have asked DeMauro for the facts as to his signing, if interested therein. If such misrepresentations were made, they did not invalidate the cards.

4. Alleged Harassment by Union Solicitors

Three employees[14] testified that one of the reasons they signed cards was because the Union harassed them into signing. The substance of the testimony does not reveal more than repeated importuning to sign a card sometimes by telephone calls at night. Assuming, *arguendo,* the truth of the testimony, it is immaterial. There is clearly no evidence of coercion. Such evidence does not invalidate the cards.

5. Alleged Ignorance of Purpose of the Card

Employee Ruth Hill testified she did not know what the card was for when she signed it. Her testimony reveals that a week earlier she had been handed a card and told it was for the Union. She asked the man who gave her the instant card, "what was everybody signing it for — the Union?" He repied, "Yes." She testified she asked this man "about the cards that were going around for the Union." She asked the man "about signing for the Union for cards." I find Hill knew what she was signing.

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[13] Theresa Gentile and Hollyfield Hardwick.

[14] Elizabeth B. Hayes, Angeline Speziale and Atilia DeRenzo.

Angela Casais testified she did not realize she was signing a card for the Union. The card was in English and she neither reads nor speaks English. However, she testified her daughter and 16 year old granddaughter told her before she signed, that the card was about the Union "and it was a benefit for the others." She was told the card was a benefit "for the workers." I find she knew she was signing a card for the Union for the benefit of her fellow employees. The card is valid as is that of Hill.

6. Concluding Findings as to Majority

Respondent, in its brief, has attacked 26 cards of employees on the grounds above stated in addition to the attack on all cards because of Secret. I find no merit to these attacks and find that from January 19 to February 7, the Union had valid cards from 69 of the 107 employees in the appropriate unit.

F. Violations of Section 8(a)(1)

I find Union Representative Arthur Appell was an honest witness. Respondent strongly attacks the credibility of Appell in its brief but after a careful study of the entire record including the most extensive cross-examination of Appell, I am convinced that he was an intelligent witness who testified truthfully. His demeanor impressed me favorably.

Appell testified that union organization began on September 6, when he distributed leaflets to Respondent's employees in front of Respondent's plant. He handed a leaflet to Minnie Pricone, one of Respondent's two owners, who took it into the plant. I find that Respondent was aware of union activity at its plant as early as September 6.

[Violations Before January 19]

1. Virgilio Coelho

At the time Coelho testified he was on strike. He impressed me as a reliable witness. In early November, Frank

Rametta, Respondent's president, spoke to Coelho in Rametta's office. Minnie Pricone was present. Rametta told him the boys were trying to put the Union in the shop. Rametta then said, "You're a good boy and I'm going to give you a 25 cents raise." Then he said, "I just don't care about the Union. Don't sign any papers and I will see you later." The next week he received a 25 cents raise. During the conversation with Rametta, Rametta said DeMauro would speak to Coelho about the Union. Coelho indicated in his testimony that around the time he received the raise he had more responsibility on his machine. However, Rametta's statements to Coelho make clear that a basis for his raise was his hoped for rejection of the Union. I find Respondent violated Section 8(a)(1) of the Act by promising Coelho a raise and giving him one conditioned on not signing with the Union.

2. Theresa Gentile

Theresa Gentile has been an employee of Respondent for 22 years. Early in November she spoke to Rametta and Minnie Pricone about the Union. They asked her, in their office, if she had signed for the Union. She said she had. Mrs. Pricone said she didn't like the idea because having been with the Company for so many years Gentile was just like one of the family. Rametta said they didn't want the Union in the shop. It was about this point in her testimony that Gentile volunteered that she wished she had never signed a union card and would rip it up if she had it. She said she got no peace in her house or in the shop. Rametta indicated to her that if the plant went Union the employees would not make as much money. Rametta added that he never wanted to see the Union in the shop and "would close the shop first before he would let the Union in." He said that if the Union came in, the shop wouldn't be the same, the hours of work would be less and they would not be shifted from job to job but rather would be sent home if there was no work. They had always worked a 40-hour

week. In the middle of November, Rametta discussed a pay raise with Gentile. He told her if she wanted anything just to come to him. If she had a problem he would take care of her. Two to four weeks later she received a pay increase. Rametta denies a conversation with Gentile about the Union. Gentile, at the time she testified, was most anti-union. She wanted to destroy her card. She testified in the presence of Rametta and his two very able attorneys and possibly before Sal Malluzzo who was usually present at the hearing. She was a most reluctant witness for the General Counsel, who had to refresh her recollection from her pretrial affidavit. She obviously testified truthfully against Respondent's interests which she showed by her testimony were akin to hers. Rametta was present at these lengthy proceedings "from morning to night." I distinctly do not credit Rametta's testimony. Most of his testimony on direct examination came from leading questions although I continually admonished against this, until it became pointless. In some instances he didn't recall conversations he had with employees. He admitted he told Benny Fiamma that he'd "be sorry by doing all these things here because you know my position."[15] He asked Fiamma not to make it harder for him because he was 74 years old. Rametta was perfectly able to reply to nonleading questions as evidenced by his frequent volunteered answers. Rametta deeply loves his shop and believes his employees should reciprocate. He and other employees have been working there 35 years. He could not recall conversations with employee Spada about wage increases. He did recall that he told his assembled employees they should not have a bunch of New York guys[16] come in and tell him what to do. He went to employee John Reed who had worked for him for 22 years and asked him to find out who had gotten the Union going and what was going on. He asked Reed what

[15] "These things" obviously referred to Fiamma's union activities. Fiamma was very active in union organization.

[16] Testified to by General Counsel's witness as Jews.

he thought of the union situation. He told Reed, who was negro, to "See some of your people in packing." All the packing employees were negroes. Reed reported to Rametta that only two packing employees had signed cards out of 16 or 17 employees he had interrogated.

I credit the testimony of Gentile in these respects. Respondent violated Section 8(a)(1) of the Act by Rametta's statements that the employees would not make as much money if the plant went Union, that he would close the shop before he would let the Union in, that the shop wouldn't be the same if the Union came in, they would work less hours and would be sent home rather than shifted from job to job. Respondent also violated Section 8(a)(1) of the Act by promising and granting a wage increase to Gentile for the purpose of discouraging her union activities.

3. Thomas Spada

Thomas Spada had been an employee of Respondent for 12 years and was on strike when he testified. He impressed me as an honest witness. On January 12, he had a conversation with Rametta in the latter's office. Rametta asked him how many children he had and he said three. Rametta suggested he could use more money and Spada agreed. Rametta said he'd find a little extra in his pay envelope the next week. Rametta added that he had heard the boys were signing union cards. Rametta continued, saying that as long as he lived there would be no Union in the shop and nobody would tell him how to run his place. He said that if a union got in they would work only a 35-hour week and the employees would end up losing money. As Spada was leaving Rametta asked him to talk to the boys and see what he could do. In the conversation Rametta said that if the Union got in, all the women would be out of a job and he would subcontract the work. He said that if the Union came in he would get two more cutters to cut down on overtime. Rametta finally asked Spada to talk to the boys and

see what he could do and told him he would take care of him as long as he was a good boy. Rametta said there would be a raise the next week. Spada did not get the raise.

I find Respondent violated Section 8(a)(1) of the Act by Rametta's promise of a raise to Spada if he would drop the Union and by threatening detriments to employees if they chose the Union.

4. Antonia Salidino

Salidino truthfully testified that Minnie Pricone asked her in November, whether she had signed a card for the Union.[17] This interrogation violated Section 8(a)(1) of the Act.

[Violations After January 19]

On January 19 and 20 Rametta gave talks to his assembled employees, the first in Italian, the second in English. I find insufficient credible evidence that Rametta violated Section 8(a)(1) in either speech. He did, however, tell the employees that if they did not want to talk to him they could talk to Sal Malluzzo, Sal Pricone, Frank Garfi, or John Reed. This was in the context of talk about the Union.

1. John Reed

Reed is not a supervisory employee. He was an employee with 26 years service for Respondent.

Shortly after receiving the Union's first demand for recognition, Rametta called Reed into the office. Rametta told Reed he had heard the shop was 90 percent Union and he wanted Reed to verify the facts in the shipping department. Reed then interrogated employees in the shipping department and two cutters and some pressing department

[17] Mrs. Pricone did not testify because of a physical and emotional condition as evidenced by a Doctor's certificate.

employees. Considering Reed's demeanor I am convinced he testified with considerable prejudice on behalf of Respondent. I find from all the evidence that he interrogated more employees than he admitted. He admitted telling some employees that if the Union came in and there was no work in their department, they would lose time. Customarily, they always worked a 40-hour week.

Florence Mond credibly testified that Reed told her not to sign a card after she denied signing one, adding that if she signed "they" would find out. Reed then spoke to the rest of the pressers.

Mozella Peters credibly testified that after she denied signing a card in response to Reed's interrogation, Reed told her to stay away from the Union and Rametta would take care of her. Peters then received a raise of 15 cents an hour. This may have been to bring her up to the new Federal minimum wage. However, the next week, Reed asked her if Rametta had not taken care of her as he said he would.

Reed's widespread interrogations had no safeguards to detract from their coercive nature and were in some instances accompanied by theats and promises of benefits. This was after Rametta told the employees to talk to Reed about the Union. I find it clear that Reed was an agent of Respondent in this activity which violated Section 8(a)(1) of the Act.

2. James Bostick

Bostick was an employee of Respondent for 3½ years. He appeared to me to be a reluctant but most honest witness for the General Counsel. Around January 19, Reed asked Bostick if he had signed a card. When Bostick said he had, Reed wrote on a pad and then went into Rametta's office. A short time later Rametta came to Bostick and asked him if he had signed a card. Bostick admitted he had. Rametta said if anyone had told him Bostick had signed a card he

would have spit in his eye because Bostick was like a son. Rametta told him Supervisor Garfi was on his way out and Bostick was going to take over the shipping department. Rametta told Bostick he would be sorry if he went with the Union. Rametta left and about 15 minutes later he returned and told Bostick his paycheck would be heavier on Friday. He asked Bostick to find out from another employee, Lynn, why she had signed a union card as reported by Reed, and Bostick agreed to do so. After the conversation, Bostick received a 10-cent raise.

By Rametta's conduct with respect to Bostick as herein found, Respondent violated Section 8(a)(1) of the Act.

3. Edward Walton

Walton was employed by Respondent for about 9 years when he testified. I credit his testimony. In January Reed asked Walton if he had signed a union card and Walton replied it was none of Reed's business. Shortly thereafter, Rametta came to Walton and asked him if he had signed a union card. Walton said he had. Rametta asked him why and Walton said he was just going along with the boys. About January 23, Rametta asked Walton if he was going to be with him and Walton said he'd have to wait and see. I find Walton's testimony inconclusive as to whether Rametta's giving him some shirts had anything to do with union activity.

Reed's and Rametta's interrogations of Walton provided no safeguards, and they were coercive, in violation of Section 8(a)(1) of the Act.

4. Aurelia Fusco

Fusco appeared to me to be an honest witness. She was an employee of Respondent when she testified and had been for 4½ years. On January 20 Supervisor Sal Pricone asked her if it were true that she had signed for the Union. She said she hadn't, though she had. He reminded her of past

failings and told her "you would have something to lose if you did sign to get the Union in." By his interrogation and threat, Pricone on behalf of Respondent, violated Section 8(a)(1) of the Act.

5. Famiglietti and Fiamma

These employees mutually corroborated each other and I do not credit Rametta's testimony where it contradicts theirs. Each impressed me as a reliable witness. About January 26, in front of the entrance to the plant, Rametta spoke to Famiglietti, Fiamma and Bostick. Rametta asked Fiamma if he was still working hard for the Union. When Fiamma gave a defensive answer, Rametta told Fiamma he was g ng to lose. He said they didn't need the Union and he could take care of them. He said that instead of paying union dues they could have their own plant insurance. He said he was 73 years old and didn't need the shop, so he could close it up, he could subcontract all but the shipping room. He told them that if they wanted to be happier in the cutting room he could change the head of the shipping department. He said the men were going to be hurt and a lot of innocent people would be hurt, too. By Rametta's threats and promises to Famiglietti, Fiamma and Bostick, Respondent violated Section 8(a)(1) of the Act.

G. Discharge of Concetta Cambria

Cambria was employed by Respondent for at least 14 years. Her demeanor impressed me favorably. She testified about her discharge over the telephone by Vice President Minnie Pricone. As previously noted, Minnie Pricone did not testify. On the night of May 10, the day the hearing in this matter opened, Mrs. Pricone called Cambria, as was a not unusual practice. They had been friends for years. Mrs. Pricone said she never expected Cambria to join the Union since they had been friendly. Cambria said she had joined the Union. Mrs. Pricone wanted to know if Cambria had anything against Respondent. Cambria said she did

not. Mrs. Pricone then said, "You know, in doing that, you know you lost your job. You lost the insurance." She said Cambria had lost her job because she had joined the Union.

I have not the slightest doubt that Mrs. Pricone discharged Cambria because of her union activities.

Cambria was on leave to take care of her sick husband, when she was discharged. Sal Malluzzo testified that Respondent never sent a discharge notice to Cambria and that she was still in Respondent's employ at the time of the hearing. Absence of a notice of termination does not militate against Mrs. Pricone's clear and authoritative words of discharge. There is no evidence that Respondent has ever offered Cambria reinstatement. I find Respondent discharged Cambria on May 10, while she was on leave to care for her sick husband, because of her union activities, in violation of Section 8(a)(3) and (1) of the Act.

H. Refusal to Bargain

Respondent, by its numerous unfair labor practices, demonstrated its bad faith in refusing to bargain with the Union which represented the majority in an appropriate unit. Respondent has shown a complete rejection of the collective-bargaining principle and its determination to destroy the union's majority. Respondent sparred for time and committed unfair labor practices in an effort to undermine the union's majority. Respondent's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act.[18]

1. The Unfair Labor Practice Strike

On May 25, during the course of the hearing, the complaint was amended to allege that a strike which began on February 7, was an unfair labor practice strike.

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[18] *Joy Silk Mills, Inc.*, 185 F.2d 732 (C.A.D.C.), cert. denied, 341 U.S. 914.

On February 7, employees of Respondent went on strike. On February 6, according to the credited testimony of Bert Cooper, the union's state director,[19] about 35 of Respondent's employees attended a meeting and voted to go on strike because of Respondent's unfair labor practices. The strike which began on February 7, was an unfair labor practice strike and was so announced by a picket sign.

J. Unilateral Elimination of Certain Job Classifications and Refusal to Reinstate Strikers

It was stipulated that the following employees of Respondent engaged in the strike against Respondent on February 7, and continued to strike until they applied for reinstatement on the dates indicated alongside their names:

Joseph Aiello	July 24, 1967
Francois Bessette	July 24, 1967
Virgilio Coelho	July 24, 1967
Benny Fiamma	July 24, 1967
Frank Papa	July 24, 1967
Thomas Spada	July 24, 1967
Louis Greca	August 10, 1967

It was further stipulated that with respect to the first six above employees, on July 27, 1967, and with respect to the last of the above employees, on August 11, 1967, Respondent refused reinstatement on the grounds that permanent replacements had been hired and Respondent had eliminated certain jobs. The record makes clear that Respondent did not bargain with the Union about the elimination of jobs. These employees were unfair labor practice strikers and were entitled to reinstatement upon their unconditional request for the same if there were jobs available. There is no credible evidence that jobs were not available.

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[19] Considering the demeanor of Mander Henderson, I do not credit her testimony that only union cards were discussed at this meeting.

The record does not reveal the basis for the claimed elimination of jobs and I find Respondent has not sustained its burden of proving that the strikers' jobs no longer existed. Presumptively, their jobs continued in existence. It is clear that the fact some may have replaced does not affect their rights to reinstatement as unfair labor practice strikers.

IV. The Effect of the Unfair Labor Practices Upon Commerce

Respondent's activities set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. The nature of the violations strikes at the heart of the Act and calls for a broad order.

It has been found that the Union represented a majority of Respondent's employees in an appropriate unit and requested recognition and bargaining, the same being unlawfully refused. I shall recommend that Respondent bargain, upon request, with the Union and, if any understanding is reached, embody such understanding in a signed agreement.

It has been found that Respondent discharged Cambria in violation of Section 8(a)(3) and (1) of the Act. I shall recommend that Respondent offer Cambria reinstatement and make her whole for any loss of pay she may have

suffered by reason of the discrimination against her in the manner set forth in *F. W. Woolworth Company,* 90 NLRB 289, with interest computed in the manner described in *Isis Plumbing & Heating Company,* 138 NLRB 716.

It has been found that Respondent violated Section 8(a)(3) and (1) of the Act by refusing and failing to reinstate the unfair labor practice strikers upon their unconditional requests for reinstatement. I shall recommend that Respondent offer them reinstatement and make them whole for any loss of pay they may have suffered by reason of the discrimination against them in the manner set forth in the paragraph above dealing with Cambria.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of the Act.

2. The Union is a labor organization within the meaning of the Act.

3. By discharging Cambria and by failing and refusing to reinstate the unfair labor practice strikers upon their unconditional request, Respondent violated Section 8(a)(3) and (1) of the Act.

4. All employees of Respondent employed at its Hartford plant, excluding office clerical employees, guards, professional employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. The Union has been at all times since on or about January 19, and now is, the exclusive bargaining representative of the employees in the above described unit within the meaning of Section 9(a) of the Act.

6. Since January 19, by refusing to bargain collectively with the Union as the exclusive bargaining representative of the employees in the aforesaid unit, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. By interrogations, threats and promises and granting of benefits addressed to employees, Respondent has interfered with, restrained, and coerced employees and committed unfair labor practices within the meaning of Section 8 (a)(1) of the Act.

8. The strike, which began on February 7, was an unfair labor practice strike.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law, and upon the entire record herein, it is recommended that Respondent, its agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating, threatening, or making promises to or giving benefits to its employees with respect to their membership in, sympathies for, or other concerted activities on behalf of any labor organization.

(b) Discouraging membership in the Union or any other labor organization, by discharging or in any other manner discriminating against its employees, including refusing to reinstate unfair labor practice strikers upon their unconditional offer to return to work, except as authorized by Section 8(a)(3) of the Act.

(c) Refusing to bargain collectively, upon request, with the Union as the exclusive bargaining representative of its employees in the above described unit.

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to join or assist the Union or any other labor organization or otherwise engage in activities protected by the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to reinstate Cambria, Aiello, Bessette, Coelho, Fiamma, Papa, Spada, and Greca to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole in the manner set forth in "The Remedy" portion of this decision for any loss of earnings by reason of Respondent's discrimination against them.

(b) Notify any or all of the above employees, if presently serving in the Armed Forces of the United States, of their full right to reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(c) Bargain collectively, upon request, with the Union as the exclusive bargaining representative of its employees in the above described unit.

(d) Preserve and, upon request, make available to the Board or its agents all records necessary to determine the amount of backpay due under this Recommended Order.

(e) Post at its Hartford, Connecticut, plant copies of the notice attached hereto as "Appendix." [20] Since many

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[20] In the event that this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

of Respondent's employees only read Italian and others only Spanish, the Appendix is to be written in English and in Italian and in Spanish. Copies of said notice, to be furnished by the Regional Director for the First Region, shall after being signed by Respondent's authorized representative, be posted by it immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced or covered by any other material.

(f) Notify said Regional Director, in writing, within 20 days from the date of the receipt of this Recommended Order what steps Respondent has taken to comply herewith.[21]

Dated:

E. DON WILSON
Trial Examiner

[21] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region One, in writing, within 10 days from the date of this Order, what steps it has taken to comply herewith."

TXD-(SF)-42-68

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
THE RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE
NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT
(AS AMENDED)

we hereby notify our employees that:

You are free to join or not to join any union of your choice. We do not have the right to interfere with your choice.

WE WILL NOT question, threaten, or make promises to or give benefits to our employees in connection with their membership in or sympathies for or other activities in behalf of Local 153, International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization.

WE WILL NOT discharge or in any other way discriminate against any of our employees because of their activities in behalf of the above-named Union or any other union or because of other protected concerted activities.

WE WILL NOT refuse to bargain collectively with the above-named Union as the exclusive bargaining representative of our employees in the following appropriate unit:

> All employees employed at our Hartford, Connecticut, plant, excluding office clerical employees, guards, professional employees and supervisors as defined in the National Labor Relations Act.

WE WILL NOT in any other manner interfere with our employees in exercising their rights to join or assist, or to refrain from joining or assisting any union, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized by Section 8 (a) (3) of the Act.

WE WILL pay Concetta Cambria for the wages she lost because we discharged her.

WE WILL pay unfair labor practice strikers, Joseph Aiello, Francois Bessette, Virgilio Coelho, Benny Fiamma, Frank Papa, Thomas Spada, and Louis Greca for the wages they lost because we did not reinstate them when they unconditionally asked for their jobs back.

WE WILL bargain collectively, upon request, with the above-named Union, as the bargaining representative of our employees in the above described unit, and embody in a signed agreement any understanding we reach.

WE WILL NOT tell our employees that they will not make as much money if the plant goes Union or that we will close the shop before we let the Union in or that the plant won't be the same if the Union comes in or that the employees will work less hours and would be shifted from job to job if the Union comes into our plant.

WE WILL NOT tell our employees that if a union comes in they will only work a 35-hour week or that they will end up losing money.

WE WILL NOT ask any of our employees to talk to other employees and persuade them against the Union.

WE WILL NOT tell any of our employees that if the Union gets in, the women employees will be out of a job and that we will subcontract the work.

WE WILL NOT tell any employee that if the Union comes into our plant, we will get more employees and cut down on overtime.

WE WILL NOT ask any employee if he has signed a card for the Union or engaged in any other union activity.

WE WILL NOT tell employees that if the Union comes in they will lose time if there is no work in their departments.

WE WILL NOT tell our employees that we will find out if they engaged in union activity.

WE WILL NOT tell any employee that we will take care of him if he does not engage in union activities.

WE WILL NOT tell any employee that he will be sorry if he goes Union.

WE WILL NOT ask an employee to find out from another employee why he had signed a union card.

WE WILL NOT tell an employee that he has something to lose if he signs to get the Union into the plant.

MARIE PHILLIPS, INC.

(Employer)

Dated..... By .....
(Representative) (Title)

NOTE: We will notify any of the above employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 20th Floor, John F. Kennedy Federal Building, Cambridge and New Sudbury Streets, Boston, Mass., Telephone No. 223-3300.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1594

MARIE PHILLIPS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not yet officially reported. The Board's decision and order (Pet. App. B) are reported at 178 NLRB No. 53.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1971. The petition for a writ of certiorari was filed on April 19, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

425-321—71

QUESTION PRESENTED

Whether, on the facts of this case, the Board properly found that the union possessed authorization cards from a majority of the employees that were not obtained fraudulently or by misrepresentation.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at Pet. 2–3.

STATEMENT

On September 6, 1966, the Union [1] initiated a campaign to organize the employees of petitioner (the "Company"). In the next few months, it obtained 68 signed cards from the 110 employees in the appropriate bargaining unit, designating the Union as the bargaining representative (A. 634–635, 659; 3–5, G.C. Exh. Nos. 3a–15, 17, 19, 20–27, 29–32, 34, 36–42, 44, 45–68, 70).[2] While the Union campaign was underway, Company officials interrogated employees respecting their Union sympathies and activities; threatened employees, *inter alia,* with plant closing if the Union became the employees' bargaining representative; promised employees various benefits and granted several employees pay raises in an attempt to weaken their support for the Union; discharged one Union advocate, Concetta Cambria; and refused

[1] Local 153, International Ladies' Garment Workers' Union, AFL–CIO.

[2] "A." refers to the appendix to the briefs in the court below.

to reinstate seven employees who struck over the Company's unfair labor practices (Pet. App. B, pp. A30–A40, A42).[3]

On January 19, 1967, the Union requested the Company to recognize it as the bargaining representative of the Company's employees (A. 624–625; 429–434, 572 (47)–(49)). The Union offered to prove its majority through a card check conducted by an impartial observer agreed to by the parties (A. 624–625; 520–521, 572 (36)–(37), 572 (43)–(46), 572 (73)–(74)). On January 24, Frank Rametta, the Company's president, responded that he did not believe the Union represented a majority of the employees and that therefore he was declining to recognize the Union (A. 625; 572 (47)–(49)). On January 25, the Union again demanded recognition and was again rebuffed (A. 625; 572 (65)–(66)).

The Board found that the Company violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union (see Pet. App. B, p. A42). It rejected the Company's contention that the Union lacked valid authorization cards from a majority of the employees because some 26 employees had signed cards only after Union representatives falsely asserted "that a majority had already been obtained" (Pet App. B, p. A8). In doing so, the Board stated that "[w]here the objective facts, as evidenced by events contemporaneous with the signing, clearly demon-

[3] The Company does not challenge here the Board findings that by these acts petitioner violated Section 8(a) (1) and (3) of the Act.

strate that the misrepresentation was the decisive factor in causing an employee to sign a card, we shall not count such card in determining a union's majority. However * * * where the only indication of reliance is a signer's subsequent testimony as to his subjective state of mind when signing the card, such showing is insufficient to invalidate the card" (Pet. App. B, p. A9).

Following a review of the record, the Board found that "[o]f the 26 disputed signers only about half a dozen—a number clearly insufficient to destroy the Union's majority in the 110 employee appropriate unit * * *—testified as to objective facts" (Pet. App. B, p. A11, n. 6). Moreover, it noted, the Examiner had found that testimony controverted and declined to credit it (*ibid.*). The remaining employees had given "*subjective* testimony only," which, the Board held, was not of sufficient probative value to impeach their earlier act of signing a clear and unequivocal authorization card (Pet. App. B, pp. A11–A12). Since the Company had not shown that the cards that it challenged were improperly obtained, the Board upheld the Union's asserted majority status.

The Board ordered the Company to cease and desist from the unfair labor practices found, to reinstate with backpay the employees discriminated against, to bargain with the Union as the exclusive representative of the employees, and to post appropriate notices (Pet. App. B. pp. A14–A17). The court of appeals sustained the Board's findings and conclusions and enforced its order (Pet. App. A.)

ARGUMENT

Contrary to petitioner's assertion (Pet. 6–7), the decision below does not conflict with decisions in other circuits. Applying well established and accepted principles, the Board concluded that in this case there was an "absence of strong and convincing evidence of objective facts showing that the card majority in this case would not have been obtained but for the misrepresentation that a majority had already signed up" (Pet. App. B, pp. A12–A13). The court below utilized a like test in enforcing the Board's order, explaining that "puffing [that a majority of the workers had already signed union authorization cards] does not vitiate the cards unless the comments were a means of coercing employees to sign cards out of a fear of majority reprisal" (Pet. App. A, p. A4). Necessarily, a determination such as this turns on the particular facts presented. Thus properly viewed, the decision below is consistent with the decisions in other circuits relied on by petitioner (Pet. 6–8).

The only question here is whether the Board properly declined to rely on petitioner's proof—which consisted of employee testimony, given long after the cards were signed, as to the subjective reaction of the employee at the time of signing to the Union's alleged misrepresentation that a majority had already signed.[4] This issue does not warrant further review. In *National Labor Relations Board* v. *Gissel*

[4] As shown above, of the 26 disputed signers only about half a dozen, a number insufficient to destroy the Union's majority, "testified as to certain objective facts which might tend to show that their cards would not have been signed in the first instance but for the misrepresentation that a majority had al-

Packing Co., 395 U.S. 575, 608, the Court "reject[ed] any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry". This is essential, the Court held, "because employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activities in violation of Section 8(a)(1)" (*ibid.*).[5] This

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ready signed" (App. B, p. A11, n. 6). In effect, the balance of the testimony consisted of uncorroborated employee declarations that they would not have signed if they had not been told that a majority or more of the employees had signed. See, e.g., the testimony of Cancellieri, A. 572 (116)–(117); Interlandi, A. 572 (137)–(138); Casais, A. 572 (134)–(135); Canassi, A. 572 (117)–(125); Cereio, A. 573 (143)–(144); Henderson, A. 364, 365, 366; Gentle, A. 566, 568; Thomas, A. 117, 118; Hall, A. 110, 111; Hill, A. 107; Formica, A. 497; Hardwick, A. 493, 494, 495; Hayes, A. 529; Rizza, A. 33, 541, 544; Tosi, A. 90; DeRenzo, A. 100–101; Campbell, A. 109; Contino, A. 492.

[5] Indeed, this case confirms the Court's concern. Employee Sammartino at the original Board hearing testified that she signed a card because she was nervous, and that the Union solicitor showed her a bunch of cards which she estimated as less than a majority, but did not tell her how many others had signed. It was not until the reopened hearing, some 5 months later, that Sammartino stated she would not have signed but for the representation that almost all the employees had already signed (Pet. App B, pp. A11–A12). The Board noted additional instances (Pet. App. B, p. A12, n. 7): "Several employees testified at the original hearing that they did not care whether the solicitor's statement as to majority status was true, and others testified that they did not believe such representation of the solicitors. Yet, upon the reopening of the hearing, a number of the aforementioned employees testified that they would not have signed had they known that the solicitor's statement was false."

rationale is equally applicable here, where the Company launched a "classic" (Pet. App. A, p. A3) unfair labor practice campaign consisting, *inter alia*, of threats of plant closing, interrogations, promises and grants of benefits, and discharges, to counteract the Union's organizing drive. Petitioner's attempt to distinguish *Gissel* (Pet. 10) is therefore without substance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971